Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

CITY OF COMBES, TEXAS, *et al.*,

Appellants,

v.

EAST RIO HONDO WATER SUPPLY CORPORTATION, *et al.*,

Appellees.

On Appeal From The United States District Court For The Southern District Of Texas (Three Judge Court)

JURISDICTIONAL STATEMENT

JOSE GARZA
Counsel of Record
LAW OFFICE OF JOSE GARZA
1913 Fordham
McAllen, Texas 78504
956.343.0157
garzpalm@aol.com

ROLANDO L. RIOS
LAW OFFICE OF
ROLANDO L. RIOS
115 E. Travis, Suite 1645
San Antonio, Texas 78205
210.222.2102
210.222.2898 fax
rrios@rolandorioslaw.com

Attorneys for Appellant

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QUESTIONS PRESENTED

1. Whether a public utility such as the East Rio Hondo Water Supply Corporation, which among other things: is specifically defined as a "political subdivision" of the state of Texas by various provisions of the Texas Water Code; is defined as a "governmental body" of the State of Texas and required to comply with open government requirements, by the Texas Open Meetings Act and Texas Open Records Act; and which enjoys exemptions from *ad valorem* taxation on some of its property is covered by Section 5 of the Voting Rights Act.

2. Whether Summary Judgment is appropriate when substantial factual matters such as whether the East Rio Hondo Water Supply Corporation conducts public elections are in dispute.

PARTIES TO THE PROCEEDINGS

Plaintiffs

City of Combes, Texas, Olga Montes, Individually and in her Capacity as Alderman for the City of Combes, Texas, Antonio Hernandez and Marian Hernandez.

Defendants

East Rio Hondo Water Supply Corporation, B.J. Simpson, Charles M. Kilbourn, Thomas F. Schmitt, Maria Hopper, Gloria Science, Santos Castillo, Ben Cowan, and Henry Lipe, currently elected and/or appointed Members of the Board of Directors of the East Rio Hondo Water Supply Corporation.

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OPINION BELOW

The opinion and judgment of the district court are not yet reported. They are reproduced in the attached Appendix. They consist of a memorandum opinion (App. 1) and judgment of the three-judge court (App. 15).

JURISDICTION

This action challenged the unprecleared election structure contained in the East Rio Hondo Water Supply Corporation's by-laws. Judgment for the defendants was entered on February 3, 2003. The memorandum opinion of the three-judge court was entered on February 10, 2003. Notice of Appeal was filed on February 27, 2003. (App. 16).

This appeal is being docketed in this Court within sixty days after the filing of the notice of appeal in the district court. Jurisdiction of this Court is invoked under 28 U.S.C. § 1253 and 42 U.S.C. § 1973c.

STATUTORY PROVISIONS

The statutory provision involved in this case is Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The text of this provision is reprinted in the Appendix (App. 22).

STATEMENT OF THE CASE

Appellants are individual residents, voters, members and customers of the East Rio Hondo Water Supply Corporation (Docket entry 1, Plaintiffs' Complaint). On or

about February 14, 1997, Appellee, East Rio Hondo Water Supply Corporation, adopted voting policies and procedures and failed to secure preclearance, as required by Section 5 of the Voting Rights Act. 42 U.S.C. § 1973c (App. 2). Appellants filed this action on September 4, 2002, challenging the East Rio Hondo Water Supply Corporation's failure to preclear these election changes[1] (Docket Entry 1). Appellants filed a Motion for Preliminary Injunction on December 4, 2002 (Docket Entry 8), and a three-judge court was convened on December 18, 2002 (Docket Entry 12). On January 17, 2003, the three-judge court filed an order setting a briefing schedule, and requiring a statement of agreed material facts and a statement of disputed material facts (Docket Entry 15). The parties submitted a joint statement of agreed material facts and a statement of disputed facts on January 24, 2003 (Docket Entry 16). Appellants also submitted additional briefing on January 24, 2003 (Docket Entry 17). On February 3, 2003, the three-judge court, on its own summary judgment motion, granted Appellees judgment as a matter of law (App. 15). Appellees filed their motion to dismiss or alternatively for summary judgment on February 4, 2003, arguing that the East Rio Hondo Water Supply Corporation was not a "political subdivision" pursuant to the Voting Rights Act (Docket Entry 26). On February 10,

[1] Plaintiffs/Appellants also asserted claims pursuant to Section 2 of the Voting Rights Act, as well as the Fourteenth Amendment to the United States Constitution. In its January 17, 2003 order, the three-judge district court severed all non-Section 5 issues and referred them to Judge Hanen, sitting as a single-judge court (Docket Entry 15). This appeal only involves issues dealing with Appellants' Section 5 claim.

2003, the three-judge district court entered its memorandum opinion (App. 1). Although, the court acknowledged the fact that the State of Texas defines non-profit water supply corporations as "political subdivisions," to which it bestows certain privileges, powers and responsibilities, the district court decided that the East Rio Hondo Water Supply Corporation was not a "political subdivision" under Section 5 of the Voting Rights Act and therefore, was immune from the preclearance requirements of the Voting Rights Act. *Id.*

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This is a case of first impression. Prior to this case, no court had had occasion to consider whether public utilities, such as the one in this case, are "political subdivisions" within the meaning of the Voting Rights Act.

Other cases involving similar governmental bodies have either found or assumed coverage under the Voting Rights Act (App. 10-11). This issue is particularly important to voters of drought-stricken regions, such as the border region of Texas where the East Rio Hondo Water Supply Corporation is located, for at least two reasons.

First, the increasing demands for the decreasing supply of water in this region make these governmental bodies more and more vital to the welfare of their communities. Second, these governmental bodies stand as the last bastion of Anglo electoral control, through the use of

obscure, almost secret voting rules, in regions of the state that have the largest concentration of minority voters.[2]

The scope of the "political subdivision" definition within the context of the Voting Rights Act has always been broadly applied. The district court's decision in this case, however, is at odds with this principle. The district court employed a "catch-22"-type analysis to reach its conclusion that water supply corporations did not fit the Voting Rights Act definition of "political subdivision." While acknowledging that the East Rio Hondo Water Supply Corporation was indeed a "governmental body," the district court nevertheless found that "Texas law did not provide a definition of 'political subdivision' that would encompass, for purposes of the Voting Rights Act, a water supply corporation" (App. 6-7). Conceding that certain provisions of Texas law make requirements of, and provide privileges to water supply corporations, which, are consistent with the requirements and privileges afforded other governmental bodies of the state, the court chose to focus on the notion that those provisions failed to define water supply corporations as "political subdivisions" (App. 7-8). Yet, when the district court analyzed other provisions of Texas law that actually defined water supply corporations specifically as "political subdivisions" of the state, the court changed its focus to the purposes of those provisions and found them to be too limited to fall within the scope of

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[2] The East Rio Hondo Water Supply Corporation is located in Cameron County, Texas which according to the 2000 Census is over 70% Mexican American. Yet, the nine member governing board for the water supply corporation had only one Mexican American at the time the case was filed.

the Voting Rights Act (App. 8). The district court, without trial or hearing, ruled as a matter of law that the functions of a water supply corporation fall outside the scope of the sort of functions required to fit the "political subdivision" definition of the Voting Rights Act (App. 9-10). Thus, rather than apply the provisions of the Voting Rights Act in a broad, inclusive manner, that would reach all voting discrimination and be consistent with the Act's intent, the court provided a roadmap to circumvent the requirements of the Act, at least with regard to political control over these increasingly important governmental entities.

The court's use of summary judgment to reach the ultimate merits of this Section 5 case also warrants this Court's review. Generally, Section 5 cases are ideal for summary disposition because they provide few, if any, factual disputes. However, when factual disputes involve substantial and material issues, summary judgment is not appropriate. Critical facts, such as whether Appellee water supply corporation engaged in public voting, were in dispute (Docket Entry 15). Moreover, to make a fair assessment of whether the functions of the water supply corporation (water supply, sewer service, flood control and drainage system) were or were not sufficient municipal functions to qualify as a "political subdivision" merited development through discovery and trial.

Clearly, this case presents substantial issues sufficient to invoke this Court's jurisdiction.

I. The East Rio Hondo Water Supply Corporation is a Political Subdivision Within the Meaning of Section 5 of the Voting Rights Act.

A. Background.

Appellants brought this action alleging, among other things, a violation of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (Docket Entry 1). Appellants alleged and Appellees admitted the East Rio Hondo Water Supply Corporation, on February 14, 1997, adopted bylaws, which specified election procedures for the election of officers and directors of the water supply corporation (Docket Entry 1; Docket Entry 4, Defendants' Original Answer and Counterclaim ¶ 2, App. 2).

It was undisputed that these bylaws and election procedures were never submitted for or received preclearance pursuant to Section 5 of the Voting Rights Act. *Id.* Appellees, however, argued and the district court determined, that the water supply corporation was not a "political subdivision" within the meaning of Section 5[3] (App. 13). Although the language of Section 5 does not expressly

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[3] Appellees rely on the definition provided in the Department of Justice Section 5 regulations that quotes Section 14(c)(2) of the Act, for the proposition that only jurisdictions that conduct voter registration are "political subdivisions" subject to the provisions of Section 5. (Docket Entry 14, Defendants' Response In Opposition To Plaintiffs' Motion For Preliminary Injunction and Supporting Memorandum, ¶ 2). Yet, the Supreme Court rejected the notion that Section 14(c)(2) limits the scope of Section 5 coverage. *United States v. Sheffield Bd. of Comm'rs,* 435 U.S. 110, 126 (1978). The Court found that a broad reading of Section 5 was required to implement fully the Congressional objectives underlying the Act and specifically rejected the proposition that only jurisdictions that engage in registration are "political subdivisions" under Section 5. *Sheffield*, 435 U.S. at 117-18, 138.

indicate its scope, Appellees' argument and the district court's interpretation are inconsistent with the legislative history and judicial interpretations of Section 5.

B. Scope of Section 5.

Early on, the United States Supreme Court interpreted the term "political subdivision" in the context of Section 5. *United States v. Sheffield Bd. of Comm'rs.*, 435 U.S. 110 (1978). The Court determined that "[t]he language, structure, history, and purposes of the Act persuade us that § 5, like the constitutional provisions it is designed to implement, applies to all entities having the power over any aspect of the electoral process within designated jurisdictions" *Sheffield*, 435 U.S. at 118. The Court found that a broad reading of Section 5 was required to implement fully the Congressional objectives underlying the Act. *Id.* at 117-118. The Court, therefore, held that Section 5 applied to an Alabama city that did not register voters. *Id.* at 138. Section 5, aimed at subtle and obvious voting procedures alike, gives broad interpretation to the right to vote and is meant to reach all necessary actions of making the vote effective. *Allen v. State Board of Elections,* 393 U.S. 544, 565-66 (1969).

Consistent with the Supreme Court's interpretation of the Voting Rights Act, and with the Congressional mandate of the Act, courts have held it to apply to a variety of different "political subdivisions." For instance, in addition to election changes involving jurisdictions such as cities, counties, school districts, and states, courts have also held the Voting Rights Act to apply to: the abolishment of the Edwards Underground Water District and creation of the Edwards Aquifer Authority, which regulated the use,

reuse, and conservation of water within or withdrawn from the Edwards Aquifer, *State of Texas v. U.S.*, 866 F. Supp. 20 (D.D.C. 1994); the Caledonia Natural Gas District, which provided natural gas service to the residents of the greater Caledonia community, *Moore v. Caledonia Natural Gas District,* 890 F. Supp. 547, 548 (N.D. Miss., 1995); and the Salt River Project Agricultural Improvement and Power District, an agricultural improvement district which operated a federal reclamation project, *Smith v. Salt River Project Agr. Imp. and Power District*, 109 F.3d 586, 588 (9th Cir. 1997).

C. East Rio Hondo Water Supply Corporation is Covered by Section 5.

Consistent with the very broad scope of the Voting Rights Act contemplated by the Congress and interpreted by the courts, the East Rio Hondo Water Supply Corporation is subject to the preclearance provisions of Section 5. First, the non-profit water supply corporation was created and is limited in its authority by virtue of the state enactments. *See*: Chapter 67, TEX. WATER CODE ANN. (Vernon Supp. 2000). Second, the state has allowed the non-profit water supply corporation to take advantage of state benefits allowed only to its political subdivisions. TEX. WATER CODE ANN. (Vernon Supp. 2000) §§ 15, 16, and 17; TEX. TAX CODE ANN. (Vernon 2001) § 11.30. For example, water supply corporations receive grants and loans under the Water Loan Assistance Program and have some of their property exempt from *ad valorem* taxation. TEX. WATER CODE ANN. § 15.102; TEX. TAX CODE ANN. § 11.30. Third, the State has determined that like other of its political subdivisions, the East Rio Hondo Water Supply Corporation and other such non-profit water supply

corporations, must comply with its open government sunshine laws. TEX. GOV'T CODE ANN. (Vernon Supp. 1994), Chapter 552 (Open Records Act); TEX. GOV'T CODE ANN. Chapter 551 (Open Meetings Act). Thus, the East Rio Hondo Water Supply Corporation must allow public access to, among other things: information regarding audit reports; detailed records on its employees; names of each officials and record of voting on all proceedings; all working papers used to estimate the need for or expenditure of public funds. TEX. GOV'T CODE ANN. § 552.022. In addition, the water supply corporation must keep minutes or make a tape recording of its meetings and make these available to the public. TEX. GOV'T CODE ANN. § 551.021, and § 551.022. A non-profit water supply corporation must also post notice of the date, hour and place, together with an agenda of its meetings, for public inspection, for at least 72 hours prior to the meeting and may not take any action on any item not included in the posted agenda. TEX. GOV'T CODE ANN. §§ 551.041-551.043. Fourth, in each of these provisions, the State has defined non-profit water supply corporations, such as the East Rio Hondo Water Supply Corporation, as a "governmental body" or a "political subdivision" of the State. TEX. WATER CODE ANN. §§ 15.001(5), 16.001(7), and 17.001(6); TEX. GOV'T CODE ANN. § 551.001(3)(I); TEXAS GOVERNMENT CODE ANN. § 552.003(a)(9). Clearly, Texas non-profit water supply corporations are governmental bodies of the State and are therefore, "political subdivisions" for purposes of Section 5 coverage.

D. The District Court's Analysis is Inconsistent With Federal and State Law.

In determining that the East Rio Hondo Water Supply Corporation was not a "political subdivision" pursuant to the Voting Rights Act the District Court initially relied on *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973) (App. 6). *Salyer,* however, involved the question of whether the strictures of *Reynolds v. Sims*, 377 U.S. 533 (1964), would apply to single purpose districts ("spd") and did not address the scope of the Voting Rights Act. This Court has in fact held that an election that is immune from the one person, one vote principle, may nevertheless be covered by the requirements of the Voting Rights Act. The election of judges, for example, need not comport with the requirements of one person, one vote, but is still covered by the mandates of Section 2 and Section 5 of the Voting Rights Act. *Compare Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972) (three-judge court), *aff'd*, 409 U.S. 1095 (1973), *with Chisom v. Roemer*, 501 U.S. 380 (1991). More to the point, in a case involving the Salt River District in Arizona, this Court ruled that the "spd" was not required to strictly conform its election structure to the demands of the Fourteenth Amendment's one person, one vote principle. *Ball v. James*, 451 U.S. 355 (1981). Yet, in a case involving that very same "spd", the Ninth Circuit determined that the Voting Rights Act was applicable. *Smith v. Salt River Project Agr. Imp.*, 109 F.3d 586 (9th Cir. 1997). The district court's reliance on the *Salyer* line of cases for guidance on the coverage of the Voting Rights Act is misplaced. *See also*: Glen P. Smith, Note, *Interest Exceptions to One-Resident, One-Vote: Better Results from the Voting Rights Act?*, 74 TEX. L. REV. 1153 (1996).

The district court's determination is also based in part on the proposition that the State of Texas simply has not recognized water supply corporations as "political subdivisions" of the state (App. 7, 10). In support of this notion the district court relies on *Tarrant County Water Supply Corp. v. Murst-Euless Bedford Independent School District*, 391 S. W. 2d 162 (Tex. Civ. App. – Fort Worth 1965, writ ref'd n.r.e.) and on its analysis of state statutes (App. 7-10).

The district court misapplied Texas law. *Tarrant County* provides little support for the district court's analysis. *Tarrant County* was decided in 1964 and determined that a water supply corporation was not exempt from *ad valorem* taxes on its real property in part because it found the water supply corporation was not a "political subdivision" of the state. However, changes made to Texas laws governing water supply corporations in 1985 and 1991, modified their status under Texas law. These amendments expanded their governmental responsibilities, provided them with opportunities to participate in programs reserved for political subdivisions of the state, and exempted them from some *ad valorem* taxation, consistent with the exemptions enjoyed by other governmental entities. These changes more clearly set out non-profit water supply corporations as "political subdivisions" of the state. *See* TEX. WATER CODE ANN. §§ 15.001, 16.001, 16.002, 17.001, 17.002; TEX. TAX CODE ANN. § 11.30; and TEX. GOV'T CODE ANN. §§ 551.001, 552.003. Moreover, some of these provisions specifically define non-profit water supply corporations as political subdivisions of the State. Thus, non-profit water supply corporations are "political subdivisions" of Texas in name and function, and should therefore, be covered under the Voting Rights Act.

Finally, the district court's analysis of the functions of non-profit water corporations simply failed to apply the Voting Rights Act in an inclusive fashion. Since the district court was relying on the *Salyer* line of cases, its analysis of the functions of a non-profit water supply corporation was too narrow. Although a non-profit water supply corporation, by its limited function and scope, may have a legitimate rationale for weighing its voting scheme toward its users, or land owners, no possible rationale could exist for adopting a voting system that discriminates on the basis of race or membership in a language minority. *Salt River Project*, 109 F.3d at 592-94. While the district court reviewed and discounted *Salt River Project,* it did so by focusing on the perception that the functions of the Texas non-profit water corporations were different and to some degree less extensive than those of the Salt Water Project.

However, a review of the functions of the Texas non-profit water corporation within the context of the broad reach of the Voting Rights Act, rather than the more narrow standard of *Salyer* would show that these types of entities are in fact "political subdivisions" of the state. First, contrary to the statement of the district court (App. 13), Texas law does define non-profit water corporations as "political subdivisions" of the state. TEX. WATER CODE ANN., §§ 15.001, 16.001, 16.002, 17.001, 17.002. As with the Salt Water Project, Texas non-profit water supply corporations have the power of eminent domain. TEX. WATER CODE ANN., § 49.222. The general rules of elections are contained in state law. TEXAS WATER CODE ANN., §§ 67.005-007. Finally, as noted previously: Non-profit water supply corporations are exempt from some *ad valorem* taxes, TEX. TAX CODE ANN., § 11.30; Texas non-profit water supply corporations enjoy privileges and

benefits as political subdivisions of the state, TEX. WATER CODE ANN., §§ 15.001, 16.001, 16.002, 17.001, 17.002; and Texas non-profit water corporations must comply with the open government sunshine provisions that the State has imposed on all its governmental bodies. TEX. GOV'T CODE ANN., §§ 551.001 *et seq.* and 552.001 *et seq*. Applying the Voting Rights Act in a fashion consistent with its legislative intent, results in a determination that Texas non-profit water supply corporations, including the East Rio Hondo Water Supply Corporation are "political subdivisions" under Section 5 of the Voting Rights Act.

II. Summary Judgment was Inappropriate.

The district court granted a *sua sponte* summary judgment in favor of the Appellees in this case. Summary judgment is only appropriate where no material facts are disputed. Rule 56(c), F. Rules Civ. Proc. Here the district court ordered the parties to submit agreed and disputed material facts (Docket Entry 15). The parties submitted pleadings placing in dispute numerous material facts including whether Appellee engages in public voting (Docket Entry 16). Under the facts and circumstances, summary judgment was wholly inappropriate.

CONCLUSION

For the foregoing reason, the Court should note probable jurisdiction and set the case for argument.

Respectfully submitted,

JOSE GARZA
Counsel of Record
LAW OFFICE OF JOSE GARZA
1913 Fordham
McAllen, Texas 78504
956.343.0157
garzpalm@aol.com

ROLANDO L. RIOS
LAW OFFICE OF
ROLANDO L. RIOS
115 E. Travis, Suite 1645
San Antonio, Texas 78205
210.222.2102
210.222.2898 fax
rrios@rolandorioslaw.com

Attorneys for Appellant

April 2003

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS – BROWNSVILLE DIVISION –

CITY OF COMBES, TEXAS, ET AL.	§	
	§	**CIVIL ACTION**
	§	**NO. B-02-169**
VS.	§	**(Three-Judge**
	§	**Dist. Court)**
EAST RIO HONDO WATER SUPPLY CORP. ET AL.	§	
	§	

MEMORANDUM OPINION

The court has previously entered judgment against plaintiffs' claims under § 5 of the Voting Rights Act. This memorandum opinion explains our decision.

Pursuant to § 5 of the Voting Rights Act of 1965, the City of Combes and its three co-plaintiffs requested that this three-judge district court be convened to decide whether East Rio Hondo Water Supply Corporation ("Corporation") is a political subdivision covered by § 5 and, if so, whether the Board Election scheduled for February 11, 2003, must be enjoined pending the Corporation's submission for preclearance of certain changes in its bylaws pertaining to its electoral procedures. Having obtained full briefing from the parties and a list of relevant, undisputed facts, and having informed the parties that we might consider issuing a summary judgment, we conclude that judgment as a matter of law should be granted for the defendants.

I. BACKGROUND

We recite here only those facts that are not in dispute. The Corporation is a non-profit water supply corporation which is organized and operates under the provisions of Chapter 67 of the Texas Water Code and the general provisions of the Texas Non-Profit Corporation Act, art. 1396-1.01, *et seq.,* Tex. Rev. Civ. Stat. It is in the business of supplying potable water service to member individuals and corporations and municipalities by contract within an area defined by the Texas Natural Resource Conservation Commission.

The Corporation participates in a financial assistance program administered by the United States Department of Agriculture. As a condition of participation, the Department of Agriculture requires the Corporation to charge a refundable $100 membership fee. Upon payment of this fee, every person (including any legal entity) entitled to service under the bylaws becomes a member of the Corporation. The principal purpose of this fee seems to be to cover the costs associated with connecting and disconnecting the member's property to the Corporation's infrastructure. Additionally, the fee acts as a deposit for delinquent water accounts.

On February 14, 1997, the East Rio Hondo Water Supply Corporation adopted its current bylaws. The Corporation is governed by a nine-member Board of Directors, elected by and from the membership. These elections are held annually, on the second Tuesday of February. At no time has the Corporation submitted these bylaws for preclearance pursuant to § 5 of the Voting Rights Act.

On September 4, 2002, the plaintiffs initiated a suit, raising claims under §§ 2 and 5 of the Voting Rights Act of 1965 and the 14th, 15th, and 19th Amendments. The § 2 and constitutional claims have been severed and will be heard by a single-judge district court. This three-judge district court considers only the plaintiffs' claims arising under § 5 of the Voting Rights Act.

II. DISCUSSION

A. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure allows the court to enter summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions or file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

B. Section 5 of the Voting Rights Act

Section 2 of the Voting Rights Act provides, in pertinent part, that

> [n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.

§ 2(a), codified at 42 U.S.C. § 1973. Criteria for the violation of § 2(a) are laid out in § 2(b).

To guard the rights guaranteed in § 2, Section 5 requires a covered entity to submit any proposed enactment or alteration in the administration of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" for preclearance to either the Department of Justice or a three-judge federal district court in the District of Columbia. *See* 42 U.S.C. § 1973c.

The Voting Rights Act authorizes private suits, such as this one. Relief, if granted, takes the form of a stay of the election and the requirement that the defendant seek preclearance of proposed electoral changes from the Department of Justice. *Id.*

C. Plaintiffs' Allegations

In support of the plaintiffs' claim that the Corporation violated the Voting Rights Act, they make essentially two allegations. They argue, first, that the Corporation failed to submit the 1997 bylaw changes for preclearance and, second, that the Corporation's 1997 bylaw electoral changes, particularly the imposition of the $100 membership fee, have a prejudicial effect upon protected voting rights.

As a threshold requirement for the resolution of both, a plaintiff must demonstrate that the relevant entity is actually covered by the Voting Rights Act. A covered entity is defined in § 2(a) as one of several states (Texas is one of them) or a "political subdivision" thereof. The pertinent question before this court is thus whether the Corporation constitutes a "political subdivision" of the State of Texas for purposes of the Voting Rights Act.

Because this court finds that the Corporation is not such an entity, it accordingly holds (1) that the Corporation need not have submitted its electoral changes for preclearance and (2) that there is no need to decide whether these bylaw changes resulted in the "denial or abridgment" of protected voting rights.[1]

D. Analysis

Whether a public utility such as the East Rio Hondo Water Supply Corporation is covered by the Voting Rights Act is primarily a question of federal law. *United States v. Sheffield Board of Comm'rs*, 435 U.S. 110, 126-28 (1978). Coverage under the Voting Rights Act does not, for obvious reasons, depend exclusively upon a state's decision to denominate an entity a "political subdivision" or not. Otherwise states could avoid coverage by delegating decisions regarding electoral policy to entities that state law does not characterize as "political subdivision[s]." *See id.* at 139 (Powell, J., concurring).

That being said, the Supreme Court's analysis of coverage questions arising under this and related statutes is an exercise in the interpretation of state law. Because the proper mode of analysis, the Court held in *Sheffield,* 435 U.S. at 126-28, is functional rather than definitional, federal courts should examine how, precisely, the entity at question is treated – rather than merely defined – in the

[1] This court is powerless to rule on the second claim, because only the federal district court for the District of Columbia has jurisdiction to address it. In any event, such a ruling is unnecessary, as the Corporation is not covered, we here conclude, under the Voting Rights Act.

context of the pertinent state's law of intergovernmental relations. The most illustrative case of this sort is *Salyer Land Co. v. Tulare Lake Basin Water Storage District,* 410 U.S. 719 (1973). In considering a suit brought under 42 U.S.C. § 1983, the Supreme Court held that the voting scheme of a water storage district organized under the California Water Code did not run afoul of the Equal Protection Clause, because, "although vested with some typical governmental powers," it possessed "relatively limited authority" and provided "no other general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body." *Salyer*, 410 U.S. at 728-29.

(1) Water Supply Corporations Are Not "Political Subdivisions" Under Texas Law, Whether Viewed Definitionally or Functionally

In support of the proposition that Water Supply Corporations are "political subdivision[s]" under Texas law, the plaintiffs present three bodies of Texas statutory law: the Tax Code, Chapter 11; the Water Code, Chapters 15 through 17 and 67; and the Government Code, Chapters 551 and 552.

This court is not persuaded that any of these three bodies of Texas law provide a definition of "political subdivision" that would encompass, for purposes of the Voting Rights Act, a water supply corporation.

The Tax Code exempts property owned by a "political subdivision of the state" from taxation "if the property is used for public purposes." § 11.11. In contrast, the chapter that specifically discusses the status of water supply

corporations in no manner refers to them as "political subdivision[s]." § 11.30.

The Government Code also fails to define utilities as "political subdivision[s]." Instead, the two clauses cited by the plaintiffs, Chapters 551 and 552, both explicitly distinguish "political subdivision[s]" from "nonprofit corporation[s] organized under Chapter 67." In the Open Government Act, Chapter 551, the term "[g]overnmental body" is defined to include a broad range of entities. § 551.001(3)(A)-(J). Subchapter (D) identifies one of these as "a deliberative body that has rulemaking or quasi-judicial power and is classified as a department, agency, or political subdivision of a county or municipality"; a separate subchapter, (J), includes water supply corporations. The same definitional structure can be found in the Open Meetings act. § 552.003(1)(A). This court acknowledges that, for the purposes of the Texas Open Government and Open Meetings Acts, a water supply corporation is a "governmental body." The texts of the statutes leave, however, no room for doubt that such a corporation is *not* a "political subdivision."

Although the Water Code, at first glance, appears to lend support to the plaintiffs' argument, it does not, in the end, advance their Voting Rights Act claim. Plaintiffs' argument is plausible because the Water Code, in at least six passages, defines "political subdivision" to encompass water supply corporations. In two places Chapter 15 ("Texas Water Assistance Program") defines "political subdivision" to include "water supply corporation[s] created and operating under Chapter 67." §§ 15.001(5); 15.602(9). Subchapter 15.901 defines a "political subdivision" as, *inter alia*, "a ground water district," *id.* at 15.901(1)(G), and Subchapter § 15.952 defines a "political

subdivision" to include "a nonprofit water supply or sewer service corporation." *Id.* at (4)(A) – Chapters 16 ("Provisions Generally Applicable to Water Development") and 17 ("Public Funding") define "political subdivision" to include "any nonprofit water supply corporation created and operating under Chapter 67." § 16.001(7); § 17.001(6).

Nonetheless, plaintiffs' argument fails because in each passage where the Water Code defines "political subdivision" to include water supply corporations, the statutory language itself explicitly limits the definition to very narrow purposes. Thus, Chapter 15's definition of "political subdivision," which includes "any nonprofit water supply corporation created and operating under Chapter 67," is preceded by the phrase: "In this chapter: . . . . " The definitions of "political subdivision" in subsequent passages are similarly constrained by the phase "In this subchapter: . . . . " §§ 15.602, 15.901, 15.952. The definitions in Chapters 16 and 17 follow an identical pattern. §§ 16.001, 16.313, 17.001. It simply cannot be said that the definitions found in the Texas Water Code provide a basis for regarding water supply corporations as "political subdivision[s]" for anything other than the narrow purposes set forth in the Code.

The plaintiffs' assertions also fail to survive a functional analysis. This can be seen most clearly in the structure of the relationship between water supply corporations and political subdivisions in Chapter 67 ("Nonprofit Water Supply or Sewer Service Corporations") of the Texas Water Code. Rather than equate the two, Chapter 67 explicitly demarcates their respective purposes and functions: The water supply corporation provides; the political subdivision receives.

Purpose of Corporation

A corporation may be organized under this chapter to provide:

(1) water supply, sewer service, or both for a municipality, a private corporation, an individual, or a military camp or base; and

(2) flood control and a drainage system for a political subdivision, private corporation, or another person.

§ 67.002. This structure – that water supply corporations are distinct from "political subdivision[s]" and that they exist to serve them – is replicated in many other subchapters of the Water Code. *See, e.g.,* § 67.009 (Facilities); § 67.010 (Power to Contract with Other Entities); § 67.0105 (Contract for Water for Fire Suppression); § 67.011 (Powers of Corporations in Certain Counties).

While it is, of course, true that a municipality may engage in the provision of water services, a water supply corporation created under Chapter 67 is given a single task: providing water to "political subdivision[s]" *et al.* Regardless of a municipality's residual powers, there can be no doubting the clear distinction that Chapter 67 establishes between "political subdivision[s]" and water supply corporations. They are not the same. This chapter of the Water Code, taken as a whole, simply cannot be read as the plaintiffs suggest.

Not only has the Texas Legislature articulated the limited purpose and auxiliary status of water service corporations, but a similar conception can also be found in pronouncements from both the Texas judiciary and executive.

In the only case to address the question, a Texas Court of Appeals held that a corporation formed for the purpose of combating salt water and sewer problems of municipalities is not a political subdivision of the state. *Tarrant County Water Supply Corp. v. Hurst-Euless-Bedford Independent School Dist.,* 391 S.W.2d 162 (Tex. Civ. App.-Fort Worth 1965, (*writ ref. n.r.e.*). Similar opinions have been expressed by the Attorney General on several occasions. *See, e.g.,* Op. Atty. Gen. 1995, No. JM-011; Op. Atty. Gen. 1972, No. -1070; Op. Atty. Gen. 1970, No. -693; Op. Atty. Gen. 1941, No. 0-3433.

In light of the clarity of the language and structure of the proffered passages from the Texas Tax, Water, and Government Codes, the unequivocal precedent, and the consistent opinion of the state's Attorney General, this court does not hesitate to conclude that, under Texas law, a water supply corporation is not a "political subdivision" for purposes of the Voting Rights Act.

(2) Federal Case Law Supplies No Basis for a Contrary Interpretation of the Status of Water Supply Corporations under Texas Law

This court is similarly unconvinced that federal case law provides a basis for regarding water supply corporations such as the one at bar as "political subdivisions" for purposes of the Voting Rights Act.

Few federal courts have had occasion to consider whether the Voting Rights Act covers entities such as the East Rio Hondo Water Supply Corporation. The plaintiffs present to this tribunal three cases which, they argue, sustain their claim: *Smith v. Salt River Project Agricultural*

Improvement and Power Dist., 109 F.3d 586 (9th Cir. 1997); *Moore v. Caledonia Natural Gas Dist.*, 890 F. Supp. 547 (N.D. Miss. 1995); and *State of Texas v. U.S.A.*, 866 F. Supp. 20 (D.D.C. 1994). After careful consideration of these cases and their holdings, this court concludes that they do not.

The two district court cases the plaintiffs adduce are irrelevant to the question before this court, because the trial courts never considered the coverage issue. In *Moore* the court assumed, up front and without discussion, that the Caledonia Natural Gas District was "a valid political subdivision of the State of Mississippi with the power to sue and be sued," and then proceeded to find the plaintiff's § 5 claims "without merit and insubstantial." *Moore*, 890 F. Supp. at 548. In the other case, *State of Texas,* the court gave no consideration to the possibility that the Voting Rights Act might not cover public utilities, because, it appears, "Texas concede[d] that section 1.41 of S.B. 1477, which abolishes the [Edwards Underground Water District] is covered by Section 5." 866 F. Supp. at 24 n.8. This court declines the plaintiffs' invitation to grant precedential status to litigants' waivers of important federal prerogatives.

The most persuasive authority for the plaintiffs' argument is *Smith*, in which the Ninth Circuit Court of Appeals explicitly considered and accepted African-American litigants' contention that the Salt River Project Agricultural Improvement and Power District was subject to the Voting Rights Act's requirements. 109 F.3d 586. We conclude, however, that *Smith* can and should be distinguished from the case at bar. Our reasons for this are twofold.

First, there did not seem to be any dispute regarding Arizona law's definition of public utilities as "political subdivisions" of the state. "'Under Arizona law, the District is a 'public, political, taxing subdivision of the state, and a municipal corporation.' A.R.S. § 48-2302." *Smith*, 109 F.3d at 593. Moreover, all parties to the case appeared to agree: "The parties stipulated that, pursuant to § 48-2302, the district is 'an entity vested with all the rights, privileges and benefits granted to municipal corporations.'" *Smith*, 109 F.3d at 593. In the case at bar, by contrast, the pertinent Texas law does not define water supply corporations as "political subdivisions."

Second, the Arizona Power District had far more robust political powers than does the East Rio Hondo Water Supply Corporation. The Arizona Power District, the Ninth Circuit noted, "exercises many governmental powers, including the power of eminent domain, the power to levy taxes on lands within its boundaries, and the power to issue tax-exempt bonds." *Id.* at 593 (citations omitted). In addition, the Power District "conducts elections according to statutory procedures." *Id.* at 594. With the exception of eminent domain, Tex. Water Code, § 49.222, the East Rio Hondo Water Supply Corporation exercises none of these powers.[2]

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[2] While it is true that the Texas Water Code establishes several general rules for elections, §§ 67.005-007, the elaboration of electoral procedure is to be found, rather, in the water supply corporation's bylaws. These rules, it is important to note, are *not* found in the Texas Election Code. The facts in the case at bar are readily distinguishable from the scenario in *Smith*, where the pertinent Arizona statutes went so far as to prescribe the language of the ballots. A.R.S. § 48-2310. In all

(Continued on following page)

The primary concern of the Ninth Circuit – that enjoyment of "the powers and privileges of the political subdivision" demands fulfillment of "the duties and obligations of a political subdivision" – is simply not implicated by the very nearly apolitical status of water supply corporations in Texas. *Id.*

III. CONCLUSION

Because Texas law does not regard – in either definition or function – water supply corporations as "political subdivisions" of the state, and because federal law supplies no basis for a contrary decision, this court holds that the East Rio Hondo Water Supply Corporation is not subject to the dictates of § 5 of the Voting Rights Act. Summary judgment is granted to the defendants. The plaintiffs' suit to enjoin the corporation's upcoming elections and compel preclearance of its 1997 bylaw revisions is accordingly **DISMISSED WITH PREJUDICE.**

SIGNED this 10th day of February, 2003.

/s/ Edith H. Jones ASH
Edith H. Jones
United States
Court of Appeals

/s/ Hilda Tagle
Hilda Tagle
United States
District Court

---

important respects, Texas law does not treat water corporation elections as a matter of municipal politics.

/s/ Andrew Hanen
Andrew Hanen
United States
District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
– BROWNSVILLE DIVISION –

CITY OF COMBES, TEXAS ET AL.	§	
	§	CIVIL ACTION NO.
VS.	§	B-02-169
	§	(Three Judge District
EAST RIO HONDO WATER SUPPLY CORP. ET AL.	§	Court)
	§	

SUMMARY JUDGMENT

Before JONES, Circuit Judge, and TAGLE and HANEN, District Judges.

Having considered the record in its entirety and having given timely notice to the parties, the Court on its own motion hereby **GRANTS** judgment as a matter of law in favor of the Defendants regarding Plaintiffs' cause of action brought pursuant to Section 5 of the Voting Rights Act of 1965. An opinion outlining the basis for this judgment will be forthcoming.

Signed the 3rd day of February, 2003.

/s/ Andrew S. Hanen
ANDREW S. HANEN
UNITED STATES DISTRICT JUDGE
Signing on behalf of all members of the three-judge District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

CITY OF COMBS, TEXAS, Olga Montes, Individually and in her Capacity as Alderman for the City of Combes, Texas, Antonio Hernandez and Marian Hernandez,	§	**CIV. ACT. NO. B-02-169**
Plaintiffs	§	
v.	§	
EAST RIO HONDO WATER SUPPLY CORPORATION, B.J. Simpson, Charles M. Kilbourn, Thomas F. Schmitt, Maria Hopper, Gloria Science, Santos Castillo, Ben Cowan, and Henry Lipe, currently elected and/or appointed Members of the Board of Directors of the EAST RIO HONDO WATER SUPPLY CORPORATION,	§	
Defendants.	§	

NOTICE OF APPEAL

(Filed Feb. 27, 2003)

Notice is hereby given that the CITY OF COMBS, TEXAS, *et al.*, Plaintiffs, in this cause, appeal to the United States Supreme Court from the Final Judgment

and Order of the Three-Judge District Court in this cause. The Order and Final Judgment appealed was signed and entered on February 3, 2003, granting Defendants summary judgment on Plaintiffs' Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c cause of action.

DATED: February 27, 2003

Respectfully Submitted,

By: // Jose Garza

Jose Garza
SBN: 07731950
FBN: 1959
The Law Office of Jose Garza
1913 Fordham
McAllen, Texas 78504
(956) 343-0157

Rolando L. Rios
SBN: 16935900
FBN: 14370
Law Office of Rolando L. Rios
115 E. Travis, Suite 1645
San Antonio, Texas 78205
Ph (210) 222-2102
Fax (210) 222-2898

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was forwarded via first class mail and/or fax on this 27th day of February 2003 to the following:

By: Jose Garza
Jose Garza

J. W. Dyer
Dyer & Associates
3700 N. 10th Street, Suite 105
McAllen, Texas 78501

CHAPTER 13. WATER RATES AND SERVICES

SUBCHAPTER A. GENERAL PROVISIONS

§ 13.002. Definitions

In this chapter:

(24) "Water supply or sewer service corporation" means a nonprofit corporation organized and operating under Chapter 67 that provides potable water service or sewer service for compensation and that has adopted and is operating in accordance with by-laws or articles of incorporation which ensure that it is member-owned and member-controlled. The term does not include a corporation that provides retail water or sewer service to a person who is not a member, except that the corporation may provide retail water or sewer service to a person who is not a member if the person only builds on or develops property to sell to another and the service is provided on an interim basis before the property is sold.

CHAPTER 15. TEXAS WATER ASSISTANCE PROGRAM

SUBCHAPTER A. GENERAL PROVISIONS

§ 15.001. Definitions

In this chapter:

(5) "Political subdivision" means a city, county, district or authority created under Article III, Section 52, or Article XVI, Section 59, of the Texas Constitution, any other political subdivision of the state, any interstate compact commission to which the state is a party, and any

nonprofit water supply corporation created and operating under Chapter 67.

CHAPTER 16. PROVISIONS GENERALLY APPLICABLE TO WATER DEVELOPMENT

SUBCHAPTER A. GENERAL PROVISIONS

§ 16.001. Definitions

In this chapter:

(7) "Political subdivision" means a county, city, or other body politic or corporate of the state, including any district or authority created under Article III, Section 52 or Article XVI, Section 59 of the Texas Constitution and including any interstate compact commission to which the state is a party and any nonprofit water supply corporation created and operating under Chapter 67.

CHAPTER 17. PUBLIC FUNDING

SUBCHAPTER A. GENERAL PROVISIONS

§ 17.001. Definitions

In this chapter:

6) "Political subdivision" means a state agency, a county, city, or other body politic or corporate of the state, including any district or authority created under Article III, Section 52 or Article XVI, Section 59 of the Texas Constitution and including any interstate compact commission to which the state is a party and any nonprofit water supply corporation created and operating under Chapter 76, Acts

of the 43rd Legislature, 1st Called Session, 1933 (Article 1434a, Vernon's Texas Civil Statutes).

(J) a nonprofit corporation that is eligible to receive funds under the federal community services block grant program and that is authorized by this state to serve a geographic area of the state.

Text of subd. (3)(J) as added by Acts 2001, 77th Leg., ch. 1004, § 1

TITLE 5. OPEN GOVERNMENT; ETHICS

SUBTITLE A. OPEN GOVERNMENT

CHAPTER 551. OPEN MEETINGS

SUBCHAPTER A. GENERAL PROVISIONS

§ 551.001. Definitions

In this chapter:

(3) "Governmental body" means:

(J) a nonprofit corporation organized under Chapter 67, Water Code, that provides a water supply or wastewater service, or both, and is exempt from ad valorem taxation under Section 11.30, Tax Code.

CHAPTER 552. PUBLIC INFORMATION

SUBCHAPTER A. GENERAL PROVISIONS

§ 552.003. Definitions

In this chapter:

ix) the governing body of a nonprofit corporation organized under Chapter 67, Water Code, that provides a water supply or wastewater service, or both, and is exempt from ad valorem taxation under Section 11.30, Tax Code;

Sec. 1973c Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of

section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if

additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

(Pub. L. 89-110, title I, Sec. 5, Aug. 6, 1965, 79 Stat. 439; renumbered title I and amended Pub. L. 91-285, Sec. 2, 5, June 22, 1970, 84 Stat. 314, 315; Pub. L. 94-73, title II, Sec. 204, 206, title IV, Sec. 405, Aug. 6, 1975, 89 Stat. 402, 404.)

Supreme Court, U.S.
FILED
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No. 02-1577

IN THE

SUPREME COURT of the UNITED STATES

CITY OF COMBES, TEXAS, et al.,
Appellants

vs.

EAST RIO HONDO WATER SUPPLY CORPORATION, et al.,
Appellees

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
(THREE JUDGE COURT)

MOTION TO AFFIRM

J. W. DYER
Counsel of Record
SHARON ALMAGUER

DYER & ASSOCIATES
3700 N. 10th, Suite 105
McAllen, Texas 78501
(956) 686-6606
(956) 686-6601 Fax
dyerfirm@aol.com

Attorneys for Appellees

May 2003

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42 U.S.C.A. § 1973c 1

MOTION TO AFFIRM

Pursuant to the Rules of this Court, Appellees move to affirm the judgment sought to be reviewed because it is apparent that the question on which the decision of the case depends is so unsubstantial as to not require plenary consideration. The decision of the district court is based on a sound analysis of the undisputed facts of this case and well-settled law. There is no conflict which requires this Court's resolution.

STATEMENT OF THE CASE

Appellants brought this case under Section 5 of the Voting Rights Act ("Section 5 of the Act") seeking to enjoin Appellee, East Rio Hondo Water Supply Corporation ("the Corporation"), from conducting the election of its Board of Directors unless, and until, the Corporation obtained preclearance of its election procedures. 42 U.S.C.§ 1973c. (Docket Entry 1, Plaintiffs' Complaint). The Corporation's election procedures are stated in its bylaws. (Docket Entry 15, Statement of Agreed and Disputed Material Facts). Appellants' case centers on the question of whether the Corporation is a "political subdivision" covered by Section 5. Appellants' argument in the district court was premised on the theory that because certain Texas statutes defined the Corporation as a "political subdivision" and the Corporation was subject to the Texas Open Meetings Act and Texas Open Records Act, then, according to Appellants, the Corporation must be treated as a "political subdivision" covered by Section 5 of the Act. This theory is consistently repeated throughout Appellants' briefing and argument to the district court. (Docket Entry 8, Motion for Preliminary Injunction) (Docket Entry 17, Plaintiff's Pretrial Memorandum). The district court correctly

rejected Appellants' argument and found that, when viewed either functionally or definitionally, the Corporation was not a "political subdivision" subject to Section 5 of the Act because the statutes relied on by Appellants are limited in their application and are plainly contradicted by numerous other statutes, court decisions, and attorney general opinions, all which clearly distinguish a water supply corporation from a "political subdivision" as a matter of law. (Appellants' App. 6-12). Accordingly, the district court's judgment should be affirmed without further argument.

THE QUESTION PRESENTED IS NOT SUBSTANTIAL

Appellants have set forth only one question for consideration in this appeal, arguing that the district court erred when it found that the Corporation is not a political subdivision within the meaning of Section 5 of the Act. However, a review of the facts of this case and the applicable law make clear that the decision of the district court is correct and that this appeal does not present substantial questions requiring the consideration of this Court.

Appellees would note that Appellants' reference to "drought stricken region" and their characterization of the Corporation as a "bastion of Anglo electoral control" is not only erroneous, but it is irrelevant to the issue they present. Similarly, the Corporation has no "obscure, almost secret voting rules" as implied by Appellants. In fact, as Appellants have repeatedly noted, the Corporation is subject to the provisions of the Texas Open Meetings Act, and the Texas Open Records Act. Tex. Gov't. Code § 551.001 et seq., § 552.001, et seq. (West 2003).

Appellants also complain that the district court inappropriately determined the case summarily. The record is clear that there are no factual disputes which involve substantial and material issues. The functions and characteristics of a non-profit water supply corporation are clearly specified in the law and in the affidavits and briefing considered by the district court.

In the district court, Appellants' sole argument advocating the Corporation's treatment as a "political subdivision" for purposes of Section 5 was based on the theory that because the Corporation was named as a "political subdivision" or "governmental body" in certain Texas statutes, and enjoyed limited ad valorem tax exemption, it automatically was a "political subdivision" subject to the Section 5 preclearance requirements. The district court correctly determined this case as a matter of law considering the very authorities cited by the Appellants and numerous other authorities which clearly distinguish a non-profit water supply corporation from a " political subdivision" as a matter of law. The district court did not engage in a "catch-22 type analysis" in reaching its decision. In this appeal, Appellants for the first time cite "critical facts" as a mere pretext to avoid the district court's judgment with which they disagree. By any reasonable reading of the district court's opinion, it is obvious that the district court's reasoning is clear and correct and should be affirmed by this Court.

ARGUMENT

I. East Rio Hondo Water Supply Corporation is not a Political Subdivision Within the Meaning of Section 5 of the Voting Rights Act.

Even the broadest reading of the term "political subdivision" in the context of Section 5 will not extend coverage of the Act to a non-profit corporation like East Rio Hondo Water Supply Corporation which is created by individuals in the same manner as other non-profit corporations. It is undisputed that the Corporation has no power to collect or assess taxes, has no authority to issue tax exempt bonds, has no authority to conduct registration for voting, has no public officials, has limited exemption from ad valorem taxes, and has no governmental immunity from suit. The Corporation is clearly not an entity vested with all of the rights, privileges and benefits granted to governmental entities.

All of the cases cited by Appellants in support of their argument, and the characteristics of the entities referred to therein, are clearly distinguishable from the characteristics of East Rio Hondo Water Supply Corporation. The Edwards Aquifer Authority was specifically created by the Texas legislature as a state regulatory body to govern counties situated above the Edwards Aquifer. State of Texas v. U.S., 866 F. Supp. 20 (D.D.C. 1994). The Salt River Project Agricultural Improvement and Power District is "a public, political, taxing subdivision of the state and a municipal corporation". Smith v. Salt River Project Agr. Imp. and Power Dist., 109 F.3d. 586, 593 (9th Cir. 1997). The Caledonia Natural Gas District conceded that it was a political subdivision of the State of Mississippi. Moore v. Caledonia Natural Gas Dist., 890 F. Supp. 547 (N. D. Miss. 1995). Thus there was no serious examination in those cases of the coverage issue which is the only question presented in this case.

In this case, the relevant facts were undisputed. East Rio Hondo Water Supply Corporation is a non-profit water supply corporation which is organized and operates under the

provisions of Chapter 67, Texas Water Code (formerly Article 1434a, Rev. Civ. Stat. Tex.) and the general provisions of the Texas Non-Profit Corporation Act, Article 1396-1.01, et seq., Tex. Rev. Civ. Stat. See, Tex. Water Code § 67.001, et seq. (West 2003); Tex. Rev. Civ. Stat. art.1396-1.01, et seq. (West 2003). The Corporation is a "retail public utility" pursuant to § 13.002, Texas Water Code, which defines "retail public utility" as follows:

> "Retail public utility" means any person, corporation, public utility, water supply or sewer service corporation, municipality, political subdivision or agency operating, maintaining, or controlling in this state facilities for providing potable water, service or sewer service or both, for compensation."

Tex. Water Code § 13.002 (West 2003). This definition, like many other Texas statutes cited by the district court, clearly distinguishes a non-profit water supply corporation from a political subdivision. East Rio Hondo Water Supply Corporation is governed by a Board of Directors elected by its members. Tex. Water Code § 67.005 (West 2003). The Board of Directors adopts written procedures for nomination and election of its Directors by the Members of the Corporation. These procedures are contained within the Corporation's bylaws. Like other non-profit corporations, no state law prescribes the specific procedure for the election of the Corporation's Board of Directors. Tex. Water Code § 67.007 (West 2003). The provisions of the Texas Election Code do not apply to the Corporation's elections. No provision of Texas election law is implicated in this case.

The district court's analysis of this case is entirely

consistent with federal and state law. Appellants complain that the district court incorrectly relied on Salyer arguing that the case did not address the scope of the Voting Rights Act. The district court's analysis using the Salyer decision in determining the characteristics of a political subdivision was entirely appropriate given the sole issue in this case. Appellants' mischaracterization of the district court's use of Salyer, which clearly noted that it was a suit under 42 U.S.C. § 1973, is misguided.

Appellants next attack the district court's analysis of the Tarrant County Water Supply Corporation case arguing that Texas law has changed to alter the status of non-profit water supply corporations, and reciting the same list of statutes repeated throughout their briefing. This is plainly an incorrect argument and the district court correctly rejected this argument. As set forth in the district court's opinion, non-profit water supply corporations are defined under Texas law to be a "political subdivision" for the limited purpose of certain specific statutory schemes, such as the water financing activities of the Texas Water Development Board under Chapters 15-17 of the Texas Water Code. See, Tex. Water Code §§ 15.001(5); 16.001(7), and 17.001(6) (West 2003). The district court noted that each of these statutes limit use of the definition to "in this chapter." Tex. Water Code §§ 15.001, 16.001 and 17.001 (West 2003). The rationale for including non-profit water supply corporations within the definition of "political subdivision" for purposes of these statutory schemes is explained in a Letter Opinion of the Texas Attorney General, cited by the district court, wherein the Attorney General held that " a non-profit water supply corporation created pursuant to that statute [Article 1434a, V.T.C.S., now Chapter 67, Water Code] is not a political subdivision or a municipal or governmental agency." Op. Atty. Gen. 1995, No. JM-011. By expressly including non-

profit water supply corporations in the definitions of "political subdivision", the legislature enabled them to participate in particular water development programs. However, the use of a specialized definition of "political subdivision" in particular statutes does not change the meaning of that term elsewhere. Op. Atty. Gen. 1995, No. JM-011.

Appellees would note that Texas courts have consistently interpreted the attributes of political subdivisions to include: geographical area and boundaries, public elections, public officials and the power to assess and collect taxes. Monsanto v. Cornerstone Mun. Utility Dist., 865 S.W.2d 937, 940 (Tex. 1993). The use of the term "political subdivision" to include non-profit water supply corporations must be express, by clear act of the Texas Legislature; it will not be implied . See, Tarrant County Water Supply Corporation v. Hurst-Euless Bedford Ind. Sch. Dist., 391 S.W.2d 162 (Tex. Civ. App. - Ft. Worth 1965, writ ref'd. n.r.e.). Appellants' attempt to impose the requirements of the Voting Rights Act on a non-profit corporation based solely on definitional language limited to certain financing arrangements is without any legal merit.

Appellants further argue that the Corporation is a political subdivision pursuant to the Act because it is subject to the provisions of the Texas Open Meetings Act and Texas Open Records Act. Tex. Gov't. Code § 551.001, et. seq. and § 552.001, et. seq. (West 2003). Appellants neglect to note that these non-profit corporations are subject to these Acts because they elect to become subject to them by accepting federal funds or choosing to apply for an ad valorem tax exemption under § 11.30 of the Texas Property Tax Code. These entities are not inherently governmental as alleged by Appellants. Also, as noted by the district court, both the Open Records Act and Open Meetings Act define the term "governmental body" to

include a broad range of entities and each statute makes a clear distinction between a water supply corporation and political subdivision. Under Appellants' argument, all of the various entities listed as a "governmental body" under these Acts would automatically be subject to Section 5 of the Act. Such a result was correctly rejected by the district court.

Appellants' brief repeatedly cites those few statutes which include a water supply corporation in the definition of "political subdivision" while completely ignoring the many Texas statutes cited by the district court which expressly make a distinction between non-profit water supply corporations and "political subdivisions" (Appellants' App. 8-9). See, Texas Water Code § 67.002, 67.009, 67,010, 67.0105 and 67.011 (West 2003).

Appellees fail to point out that the Corporation is not a governmental unit under the Texas Tort Claims Act. Tex. Civ. Prac. & Rem. Code § 101.001 (West 2003) (water supply corporation not included in definition of political subdivision). The Corporation is not exempt from ad valorem taxation pursuant to § 11.11 of the Texas Property Tax Code which exempts property owned by the State of Texas or a political subdivision. Tex. Prop. Tax Code § 11.11 (West 2003).

As an entity which is a non-profit corporation, which operates as a retail public utility, which is not political, which has no power to assess or collect taxes, which is not subject to the Texas Election Code, and which is not defined as a "political subdivision" or governmental unit by numerous Texas statutes, there is no support for a conclusion that East Rio Hondo Water Supply Corporation is a "political subdivision" subject to the terms of the Voting Rights Act.

II. Summary Judgment was Appropriate

The district court appropriately granted summary judgment in favor of Appellees. There are no material facts in dispute in this case. Appellants' argument is solely based on the inclusion of water supply corporations in various definitions used in Texas statutes. The district court correctly reviewed relevant Texas statutes and the undisputed facts of the case. The judgment of the district court should be affirmed.

CONCLUSION

For the foregoing reasons, Appellants' claim is plainly insubstantial and Appellees respectfully submit that the judgment of the District Court for the Southern District of Texas be affirmed.

Respectfully submitted,

J. W. DYER
Counsel of Record

SHARON ALMAGUER

DYER & ASSOCIATES
3700 N. 10th, Suite 105
McAllen, Texas 78501
(956) 686-6606
(956) 686-6601 Fax
dyerfirm@aol.com

Attorneys for Appellees

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Supreme Court of the United States

CITY OF COMBES, TEXAS, *et al.*,

Appellants,

v.

EAST RIO HONDO WATER SUPPLY CORPORATION, *et al.*,

Appellees.

On Appeal From The United States District Court For The Southern District Of Texas (Three Judge Court)

APPELLANTS' REPLY TO MOTION TO AFFIRM

JOSE GARZA
Counsel of Record
LAW OFFICE OF JOSE GARZA
1913 Fordham
McAllen, Texas 78504
956.343.0157
garzpalm@aol.com

ROLANDO L. RIOS
LAW OFFICE OF
ROLANDO L. RIOS
115 E. Travis, Suite 1645
San Antonio, Texas 78205
210.222.2102
210.222.2898 fax
rrios@rolandorioslaw.com

Attorneys for Appellants

June 2003

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OR CALL COLLECT (402) 342-2831

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APPELLANTS' REPLY TO MOTION TO AFFIRM

Whether the East Rio Hondo Water Supply Corporation is a political subdivision under the Voting Rights Act does not and should not turn on any single characterization in state law or by whether Texas has chosen to denominate it as a "political subdivision." The appropriate analysis should be based on federal law, and thus, on a comprehensive review of the entity's functions and relationship to the state. *United States v. Sheffield Board of Comm'rs,* 435 U.S. 110, 126-28 (1978). Since there is no dispute about whether Texas is a covered jurisdiction under Section 5, it follows that all Texas political units that exercise control over critical aspects of the voting process are also covered. *Sheffield,* 435 U.S. at 127. To determine whether the East Rio Hondo Water Supply Corporation is a "political subdivision" of the state, two basic questions should be considered:

1) Can the entity be defined by a discrete geographic area within a covered state?

2) Is the entity a state actor in its functions and in its conduct of voting?

Sheffield, 435 U.S. at 163-164 and 164 n.15. A fair review of Texas law and of the facts in this case results in an affirmative determination on each question.

A. The East Rio Hondo Water Supply Corporation Functions as a Political Unit of the State in a Defined Geographic Region.

The East Rio Hondo Water Supply Corporation functions in a specific geographic area of the State of Texas. The Texas Commission on Environmental Quality

Commission (TCEQ) (formerly the Texas Natural Resource Conservation Commission, TNRCC) granted the East Rio Hondo Water Supply Corporation a Certificate of Convenience and Necessity (CCN).[1] With the CCN, East Rio Hondo Water Supply Corporation was granted **exclusive** authority to provide retail water and sewer utility service to the public within the geographic area defined by its CCN. TEXAS WATER CODE ANN. § 13.242 (Vernon 2000). Because of the authority it has been granted by the state, even for residents of the City of Combs, who also reside within the geographic area of the East Rio Hondo Water Supply Corporation, only two options exist for securing water service. One, arrange for such service from the East Rio Hondo Water Supply Corporation; or two, dig a well. Even if the City of Combs had the capacity and willingness to provide water to its residents, it could not do so without the consent of the East Rio Hondo Water Supply Corporation. *Id.*

The East Rio Hondo Water Supply Corporation also has the power of eminent domain, the power to take private property for public use. TEXAS WATER CODE ANN. § 49.222 (Vernon 2000). With the power of eminent domain the East Rio Hondo Water Supply Corporation acts with the authority of the state and has the obligation to comply with the provisions of the Fifth Amendment of the United States Constitution. *Weingarten Realty Investors v. Albertson's Inc.*, 66 F. Supp. 825, 841 (S.D. Tex. 1999). If the East

[1] A CCN is a required certification issued by the state authorizing a utility to be the sole provider of water service within the geographic area defined by the CCN. TEXAS WATER CODE ANN. §§ 13.241 & 13.242 (Vernon 2000).

Rio Hondo Water Supply Corporation condemns private property and fails to compensate the landowner, 42 U.S.C. § 1983 provides a vehicle to enforce the landowner's Fifth Amendment rights. *Id.*

State law also authorizes the East Rio Hondo Water Supply Corporation to enter and inspect public or private property, for the purpose of determining the condition, value, and usability of the property with reference to any proposed location of works, improvements, plants, facilities, equipment, or appliances. TEXAS WATER CODE ANN. § 49.221 (Vernon 2000).

Not only does the East Rio Hondo Water Supply Corporation have a distinct defined geographic boundary, the East Rio Hondo Water Supply Corporation is a state actor, deriving its authority within those boundaries from state law.

B. The East Rio Hondo Water Supply Corporation Conducts Elections Pursuant to State Law.

The East Rio Hondo Water Supply Corporation also is a state actor in the conduct of its elections. Within the boundaries of its CCN and pursuant to state election rules (although not the Texas Election Code) the East Rio Hondo Water Supply Corporation conducts voting for its board of directors and officers that permits voting by residents of its CCN geographic area whether they are customers or not, so long as they pay a $100 membership fee. Thus, state law regulates when these elections may be held. TEXAS WATER CODE ANN. § 67.007 (Vernon Supp. 2003) (elections must be held between January 1 and May 1). State law requires that directors serve staggered, two or three year terms of office. TEXAS WATER CODE ANN.

§ 67.005 (Vernon Supp. 2003). State law provides the number of directors that may serve on the governing board. TEXAS WATER CODE § 67.005 (not more than 21 directors). State law governs what officers will be elected from among the board of directors and what their salaries will be. TEXAS WATER CODE ANN. § 67.006 (Vernon Supp. 2003). State law places limits on the number of votes that residents of the geographic area may cast. TEXAS WATER CODE § 67.006 (one per member regardless of the number of memberships owned). State law requires that the board of directors be elected by the membership of the entity. TEXAS WATER CODE § 67.005. These facts, taken together with the examples contained in appellants' Jurisdictional Statement (J.S. pp. 8-9), establish that the East Rio Hondo Water Supply Corporation clearly conducts elections as a state actor and functions within the boundaries of its CCN as a political unit of the state.

C. A Comprehensive Review of the Functions of the East Rio Hondo Water Supply Corporation Shows that it is a "Political Subdivision."

As set out above and in appellants' Jurisdictional Statement, the question of whether the East Rio Hondo Water Supply Corporation is a political subdivision of the state under the Voting Rights Act should not be resolved by looking at a single state provision in isolation. When the state provisions characterizing water supply corporations as political subdivisions are considered with a comprehensive review of its functions and the source of its authority it becomes clear that the East Rio Hondo Water Supply Corporation is a "political subdivision" under the Voting Rights Act. The East Rio Hondo Water Supply Corporation has been given by the state, the exclusive

authority to provide a vital public service in a discrete geographic area; it conducts elections for its governing board and officers under authority of state law and in a manner required by state law; it is afforded other governmental powers, and has been defined as a "political subdivision" of the state for the purpose of securing important government financial programs; and it must adhere to the state's open government requirements. Taken together all these facts can support no other conclusion but that the East Rio Hondo Water Supply Corporation is a "political subdivision" under the VRA.

The isolated rulings of a Texas state court, and the Texas Attorney General opinions, which reached opposite conclusions are not dispositive. The district court's reliance on such authority was misplaced.

As correctly stated by the district court: "Whether a public utility such as the East Rio Hondo Water Supply Corporation is covered by the Voting Rights Act is primarily a question of federal law." App. 5. Moreover much of the state law authority relied on by the appellees and the district court on this point has been modified by subsequent state law enactments. The question in the case cited by the movants/appellees and by the district court was whether water supply corporations were political subdivisions of the state for the purpose of qualifying for an exemption from ad valorem taxation. *Tarrant County Water Supply Corporation v. Murst-Euless Bedford Independent School District*, 391 S.W. 2d 162 (Tex. Civ. App. – Fort Worth 1965, writ ref'd n.r.e.). The question in the Texas Attorney General opinion, Op. Atty. Gen. 1972, referenced by the district court was whether water supply corporations were political subdivisions of the state for

purposes of qualifying for the state's water related financial assistance programs. Although the answer in both instances was no, this authority has lost any probative value with recent changes in Texas law. State law was amended so that water supply corporations are now exempt from some ad valorem taxation, TEXAS TAX CODE ANN. § 11.30 (Vernon Supp. 2001) and are now defined as "political subdivisions" of the state so as to qualify for water related financial assistance programs. TEXAS WATER CODE ANN. §§ 15.001, 16.001, 17.001, 17.002 (Vernon Supp. 2000).

Finally, movants/appellees' and the district court's discounting of the requirements under Texas Open Records and Open Meetings Acts as not probative of the issue here is also flawed.[2] The movants/appellees and the district court acknowledged that water supply corporations were "governmental bodies" of the state, but

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[2] Movants/Appellees also imply that for the East Rio Hondo Water Supply Corporation, compliance with the requirements of the Open Meetings and Open Records Acts is voluntary because of its decision to choose to apply for federal funds and for an ad valorem tax exemption and therefore they should not be classed as political subdivisions of the state. Motion to Affirm, p. 7. Their position is of no consequence. When residents of an unincorporated community choose to incorporate and become a city, they do so voluntarily, yet once incorporated they are nevertheless political subdivisions of the state and covered under the VRA. Moreover, the Open Meetings and Open Records Acts do not contain any opt in or opt out provisions; do not contain any prerequisite for federal funds as a condition of compliance with Acts' requirements and only require that the water supply corporation be exempt for ad valorem taxation under § 11.30 of the Tax Code, which the East Rio Hondo Water Supply Corporation is. Thus, there is no dispute but that the East Rio Hondo Water Supply Corporation must comply with the requirements of the Open Meetings and Open Records Acts.

reasoned that because water supply corporations are included in a separate paragraph in the section of the Acts' definitions of "governmental bodies" than where the term political subdivisions is contained: "The texts of the statutes leave, however, no room for doubt that such a corporation is *not* a 'political subdivision'." App. 7. Using the district court's logic, however, Texas school districts, Texas municipal governing bodies, and Texas county commissioners courts would also be excluded as "political subdivisions" under the Voting Rights Act, since they are all also defined as governmental bodies in separate paragraphs. TEXAS GOVERNMENT CODE ANN. §§ 552.003(a)(2)(3)(5) and 551.001(3)(B)(C)(E) (Vernon Supp. 1994). It goes without saying however, that Texas cities, school boards and county commissioners courts are in fact "political subdivisions" of the state under the Voting Rights Act.[3]

A fair review of the functions of the East Rio Hondo Water Supply Corporation and its relationship to the state leaves no room for doubt. The East Rio Hondo Water Supply Corporation is a "political subdivision" under the

[3] Movants/Appellees further contend that there is no probative value in these requirements since other unspecified bodies included in the definition of "governmental body" in the state statutes are clearly not "political subdivisions." Motion to Affirm, pp. 7-8. Critically, movants fail to identify any such "governmental bodies" to which the Voting Rights Act does not apply which engaged in voting.

Voting Rights Act. The district court's judgment should be reversed.

Respectfully submitted,

JOSE GARZA
Counsel of Record
LAW OFFICE OF JOSE GARZA
1913 Fordham
McAllen, Texas 78504
956.343.0157
garzpalm@aol.com

ROLANDO L. RIOS
LAW OFFICE OF
ROLANDO L. RIOS
115 E. Travis, Suite 1645
San Antonio, Texas 78205
210.222.2102
210.222.2898 fax
rrios@rolandorioslaw.com

Attorneys for Appellants

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